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No. 91-1602

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PATRICIA SMITH,

Petitioner,

vs.

JAMES FRELAND,
CITY OF SPRINGDALE, OHIO,
PETER SCHULCZ III

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT PETER SCHULCZ III'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit Court of Appeals properly found that the Respondent officer was objectively reasonable in his use of deadly force under the circumstances.

2. Whether the Respondent police officer was entitled to qualified immunity for his use of force under *Anderson* v. *Creighton*, 483 U.S. 635 (1987) and *Graham* v. *Connor*, 490 U.S. 386 (1989) where the officer reasonably believed the suspect presented a threat of serious harm to him or to others, and where the officer had to make a split second decision as to the use of force.

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Respondents.

BRIEF OF THE RESPONDENT PETER SCHULCZ III IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondent Peter Schulcz III respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 954 F.2d 343 (1992).

RESPONDENT PETER SCHULCZ III'S PROCEDURAL STATEMENT OF THE CASE

On October 31, 1988, at approximately 9:30 p.m. Respondent Peter Schulcz III, an officer of the Springdale, Ohio police department, shot and killed Brent Smith (hereinafter

referred to as "Smith") after an automobile chase and confrontation with Smith as will be more fully described in Respondent Schulcz's factual statement. The Petitioner then filed suit against Respondent Schulcz, Police Chief James Freland and the City of Springdale, Ohio (hereafter collectively referred to as "Respondents") under Title 42 U.S.C. § 1983 ("§ 1983"). The claim against Respondent Schulcz generally alleged that he used excessive force causing Smith's death. The claims against Resondents Freland and the City of Springdale generally alleged a failure to train and ratification of unconstitutional conduct.

The Respondents filed Motions for Summary Judgment. In his Motion, Respondent Schulcz asserted that judgment should be entered in his favor because he was entitled to qualified immunity. The Motions for Summary Judgment filed by the Respondents were supported by a complete record which included affidavits and depositions of Respondents Schulcz and Freland, depositions of all witnesses to the police chase and shooting, the complete investigative record made by the City of Springdale and the City of Sharonville (where the shooting occurred), as well as photographs and diagrams of the scene of the chase and shooting.

The trial court granted Summary Judgment in favor of the Respondents. With respect to Respondent Schulcz, the trial court correctly found that he had acted reasonably and in accordance with the dictates of this Court as stated in *Tennessee* v. *Garner*, 471 U.S. 1 (1985) and *Graham* v. *Connor*, 490 U.S. 386 (1989). The Sixth Circuit Court of Appeals unanimously and correctly affirmed the trial court's grant of Summary Judgment in favor of Respondent Schulcz.

RESPONDENT PETER SCHULCZ III'S FACTUAL STATEMENT OF THE CASE

On October 31, 1988, at approximately 9:30 p.m., Respondent Peter Schulcz, an officer of the Springdale, Ohio police department, observed Smith operating an automobile in a reckless manner. Respondent Schulcz pursued Smith, and a chase ensued. While pursuing Smith, Respondent Schulcz chased Smith for approximately 2.6 miles and Smith drove at him on at least two occasions. Further, during the chase Respondent Schulcz informed the county dispatcher that Smith was wanted for assault on a police officer. Respondent Schulcz remained in radio contact with the dispatcher and other officers throughout the entire period of time he pursued Smith.

In an attempt to stop Smith, who was traveling at speeds as high as 90 miles per hour, Janice Gordon, a Sharonville, Ohio police officer, set up a road block. However, Smith was able to avoid the road block, and did so while driving at a high rate of speed. After maneuvering around the road block, Smith pulled onto Woodbine Avenue in Sharonville, Ohio, and Respondent Schulcz followed Smith down that street. Woodbine Avenue is a dead end street approximately 15 to 20 feet wide, located in a residential area of Sharonville, Ohio.

At the end of Woodbine Avenue Smith tried to turn his vehicle around in a lawn. After some jockeying of the vehicles, the police vehicle driven by Respondent Schulcz and Smith's car came nose to nose. Schulcz shouted to Smith over his loud speaker to "give it up". At that time Respondent Schulcz believed that Smith's car was immobilized as there was a local swimming pool building immediately behind and a fence and a gate to the left of Smith's vehicle. Respondent Schulcz then got out of his car and moved around its rear, intending to remove Smith from his vehicle. Suddenly, Smith backed up his car, and sped forward and crashed into Respondent Schulcz's vehicle. Smith backed up again and smashed into the fence and gate as he sped around the police

vehicle. Smith drove towards Respondent Schulcz, who was directly in the light of the headlights from Smith's vehicle. Schulcz believed that Smith was speeding at him in an effort to hit him.

As Smith "peeled out" and drove his speeding vehicle in the direction of Respondent Schulcz, the officer drew his weapon and fired one shot. The bullet went through the passenger window of the Smith vehicle, entered the passenger window approximately 12 inches forward of the rear edge of the window, pierced the passenger seat cushion, and then struck Smith in the right side. Smith's vehicle continued down Woodbine Avenue, where it came to a stop due to Smith's injuries.

While Respondent Schulcz was involved in his confrontation with Smith at the dead-end of Woodbine Avenue, Officer Gordon had positioned her vehicle at the entrance of Woodbine Avenue, and had exited her vehicle with her shotgun drawn. Officer Gordon at that time clearly believed that Smith was a danger to her.

Because Respondent Schulcz remained in radio contact throughout his attempts to stop Smith, there is an accurate time record and transcript made of the radio reports from Respondents Schulcz to the dispatcher. Further, all of Respondent Schulcz's radio transmissions were tape recorded. As a result, it is undisputed that, from the time Respondent Schulcz radioed that he was entering Woodbine Avenue to the time that he radioed that a shooting had taken place, a total of only sixty-seven seconds elapsed. Only seconds elapsed from the time that Respondent Schulcz exited his vehicle with the intention of removing Smith from his vehicle until the moment it became necessary for Respondent Schulcz to use his weapon.

The Petitioner has appended to her Petition the district court Order granting the Motions for Summary Judgment. The Sixth Circuit's Decision is also found in the Appendix attached to the Petition for a Writ of Certiorari. The Sixth Cir-

cuit's factual findings are virtually identical to the statement of facts set forth by the district court.

REASONS WHY THE PETITION SHOULD BE DENIED

1. No reasons exist for the grant of certiorari as the trial court and the Sixth Circuit applied well settled principles of law in granting summary judgment in favor of the Respondent Schulcz.

By its decision in *Graham* v. *Connor*, 490 U.S. 386 (1989), this Court provided a workable framework for the analysis of the use of force by a police officer. That decision takes into account the sometimes competing policies of providing effective and safe law enforcement operations and protecting the constitutional rights of those upon whom force is exercised by police officers. In *Graham*, this Court held that all claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop or other "seizure" should be analyzed under the Fourth Amendment and its "reasonableness" standard rather than under a substantive due process approach. 490 U.S. at 395. In *Tennessee* v. *Garner*, 471 U.S. 1 (1985), this Court held:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape and if, where feasible, some warning has been given. 471 U.S. 11-12.

Clarifying its decision in *Garner*, this Court in *Graham* provided the standards against which the reasonableness of the use of force by an officer must be judged:

> The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight . . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second decisions — in circumstances that are tense, uncertain and rapidly evolving — about the amount of force that is necessary in a particular situation. 490 U.S. 396-97.

Contrary to the Petitioner's assertion, this is precisely the standard the district court and Sixth Circuit used in analyzing the claims made in this case. The Petitioner has incorrectly stated that the Sixth Circuit has created a "per se" rule permitting the use of deadly force against the driver of a fleeing vehicle. A cursory analysis of the decisions of the district court and Sixth Circuit reveals that neither applied a "per se" rule but, in fact, closely followed this Court's dictates in *Garner* and *Graham*. More specifically, a careful reading of the decisions of the district court and Sixth Circuit reveals that the decisions were based upon the particular factual circumstances confronting Respondent Schulcz on the night of October 31, 1988. As such, the district court and the Sixth Circuit obviously followed this Court's direction that reasonableness is to be judged by the particular circumstances confronting an officer. *Graham*, *supra* at 397.

The record is clear that both the district court and the Sixth Circuit found that, under the totality of circumstances, Respondent Schulcz had probable cause to believe that Smith presented a danger, if not to him, then certainly to others. The touchstone issue here — one explicitly recognized by both courts — is whether or not Respondent Schulcz's actions were reasonable under circumstances where he had probable cause

to believe that Smith was a danger either to himself and/or to others. As such, the district court and the Sixth Circuit's decisions did nothing more than apply the settled principles of *Garner* and *Graham* to the facts presented.

The Petitioner claims in her first question presented that, because Smith "did not present a threat of death or serious harm to the Officer", summary judgment should not have been granted in favor of Respondent Schulcz.[1] However, the Petitioner simply ignores that the use of deadly force is also appropriate where an individual such as Smith is a danger to others. Both the district court and the Sixth Circuit found that, as a matter of law, Smith was a danger to others and, for that reason, summary judgment in favor of Respondent Schulcz was appropriately granted.

Certiorari should not be granted in this case as the Petitioner is essentially asking this Court to review evidence and facts presented to the trial court and the court of appeals. The Court has consistently held that it will not undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error. *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) and cases cited; *See, e.g., Rodgers* v. *Lodge*, 458 U.S. 613, 623 (1982). "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). *See Texas* v. *Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.).

Finally, the Petitioner also asserts that summary judgment should have been denied because evidence that Respondent Schulcz may have violated his own police department's

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[1] Respondent Schulcz does not concede that he did not believe that Smith presented a serious threat to him. In fact, Respondent Schulcz has unequivocally stated that he was in fear that Smith was attempting to strike him with his vehicle.

policy,[2] which embodies the standards this Court adopted in *Garner* and *Graham*, creates a genuine issue of fact. This argument must fail for one of two reasons. First, if, as the Petitioner claims, the department policy merely incorporates the standards of *Garner* and *Graham* then the analysis used and conclusions reached by the district court and the Sixth Circuit are precisely the same irrespective of which standard is applied. The result will be no different. Second, if the Petitioner claims that the department policy creates a higher constitutional standard to be used by federal courts when addressing a use of force claim, she is simply wrong. As the Sixth Circuit correctly stated, "[t]o hold that cities with strict policies commit more violations than those with lax policies would be an unwarranted extension of the law, as well as a violation of common sense." In short, departmental policies do not determine constitutional law.

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[2] Respondent Schulcz denies that his actions were in violation of the City of Springdale, Ohio Police Department policies. However, for the purposes of Respondent Schulcz's motion for summary judgment whether or not he acted in violation of a policy is of no legal significance.

2. Under the facts of this case the District Court and Sixth Circuit correctly decided the case because Respondent Schulcz was entitled to qualified immunity.

The basis of Respondent Schulcz's Motion for Summary Judgment was that judgment should be entered in his favor because he is entitled to qualified immunity. Following this Court's admonition that, where facts may be in dispute as to the existence of an officer's qualified immunity, discovery may go forward on those issues, (*Anderson* v. *Creighton*, 483 U.S. 635, 646-647, n.6), Respondent Schulcz supported his Motion for Summary Judgment with a complete factual record for the district court's review. However, the district court did not address Respondent Schulcz's argument relating to qualified immunity but, after carefully reviewing all of the undisputed facts, found that the use of force was reasonable under *Graham* and *Garner*. As fully discussed above, the district court and the Sixth Circuit found that it was reasonable for Respondent Schulcz to use deadly force to prevent Smith from leaving the scene and harming others. More specifically, both courts, while applying the "objective reasonableness" standard of *Graham*, found that Smith clearly presented a risk of serious physical harm, if not to Respondent Schulcz, then to others. In so ruling, the district court and the Sixth Circuit carefully evaluated the particular circumstances confronting Respondent Schulcz.

It is important to note that a second reason — one the district court did not address — existed supporting judgment in favor of Respondent Schulcz. *Anderson* v. *Creighton*, 483 U.S. 635 (1987) provides an officer with an objective "good faith" immunity defense in a "use of force" setting. That is, if the officer could reasonably have believed that the force used did not violate the Fourth Amendment, he is entitled to qualified immunity from suit under 42 U.S.C. § 1983. *See Graham*, *supra*, at 399 n.12.

At the time this shooting occurred, this Court had clearly established that an officer may use deadly force where he has probable cause to believe that a suspect presents a threat either to the officer or others. When this Court established that standard, it was cognizant that officers often must act quickly and without the luxury of time to weigh various alternatives. As such, this Court has recognized that an officer, when presented with a life and death situation, may make the wrong decision and still be immune from liability.

> We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials — like other officials who act in ways they reasonably believe to be lawful — should not be held personally liable. *Anderson* v. *Creighton*, 483 U.S. at 641.

Because both the district court and the Sixth Circuit properly found that the use of force was reasonable under the *Garner* and *Graham* standard — a standard *more* stringent than the one used when analyzing the qualified immunity defense — it was not necessary for either to address the qualified immunity issue. However, should certiorari be granted, Respondent Schulcz intends to argue that he is entitled to judgment in his favor on the basis of his qualified immunity.

In order for Respondent Schulcz to be entitled to judgment in his favor on the basis of qualified immunity it must be shown that a reasonable police officer in the position of Officer Schulcz could have believed that his actions were lawful in light of the law clearly established on October 31, 1988. Respondent Schulcz submits that, under the facts of this case, it is clear that he has made this showing.

The undisputed facts make clear that Respondent Schulcz had probable cause to believe that Smith was either attempting to run him down *or* was a danger to others. Respondent

Schulcz had been chasing Smith at high speeds through a partly residential area when, after it appeared that Smith's vehicle had finally been stopped and Respondent Schulcz was approaching Smith's vehicle, Smith drove his vehicle directly at Respondent Schulcz. Smith gave every indication that he intended to continue avoiding arrest, even if that meant using his vehicle as a weapon against those who blocked his escape. Although no one will ever know for certain what Smith's intentions were that night, it is clear that a reasonable police officer standing in the shoes of Respondent Schulcz on the night of October 31, 1988 would have believed that Smith was attempting to run him down and that he was a serious danger to others.

CONCLUSION

Implicit in the holding in *Graham* v. *Connor* is the acknowledgement that police officers are often put in difficult and dangerous situations. Police officers are trained to respond to those dangers; and of necessity, their responses must be at times immediate and without any opportunity to reflect fully. Reaction times are often brief and decisions must be made under fact situations involving great stress. To force an officer to delay his decision will often result in the injury or death of an officer or others. As it is, officers are injured or killed every year because of their failure to adequately respond in time to threatening situations. *See United States* v. *Robinson*, 414 U.S. 218, 234 n.5 (1973) (discussing danger to officers in traffic stops). In order to protect themselves and members of the public under these circumstances, police officers must be free to make the instantaneous decisions necessary to prevent injury to themselves or innocent bystanders without fear of civil liability.

The district court and the Sixth Circuit Court of Appeals correctly found that based upon the undisputed facts the use of force by the Respondent Schulcz was reasonable. Accordingly, for the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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